IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD TARLECKI,	:	CIVIL ACTION
	:	NO. 01-1347
Plaintiff,	:	
	:	
v.	:	
	:	
MERCY FITZGERALD HOSPITAL, ET. AL.,	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. July 15, 2002

The plaintiff Richard Tarlecki asserts several state law claims and two federal civil rights claims. The defendants are Mercy Fitzgerald Hospital and Nurse Catherine Welch (the Mercy defendants) and the Borough of Darby, Chief of Police Robert Smythe, Officer Joseph Trigg and Detective Frank Gentilini (the Darby defendants). The plaintiff's claims arise out of four incidents involving the plaintiff and the defendants. The first two incidents occurred at Mercy Fitzgerald Hospital, where plaintiff's wife was receiving treatment. The plaintiff claims he was assaulted and battered at the hospital by Nurse Welch and a security guard and then wrongfully arrested and prosecuted by the Darby defendants. The second incident occurred at plaintiff's residence in September 1999 during Hurricane Floyd, after which the plaintiff was also arrested and prosecuted by the

Darby defendants. The final incident involved an alleged assault and battery at one of the plaintiff's rental properties by defendant Trigg. The Mercy defendants and the Darby defendants have moved for summary judgment on all counts.[1]

I. Assault and Battery (Count II)

Count II of the complaint alleges assault and battery against the Mercy defendants arising out of two incidents that

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1. In the plaintiff's responses to the defendants' motions, the plaintiff argued that, pursuant to Nanty-Glo Boro. v. American Surety Co. of New York, 309 Pa. 236, 163 A. 523 (1932), summary judgment is not appropriate because the evidence presented at this stage of the litigation is based upon oral testimony, which must be assessed by a jury. At oral argument, however, the plaintiff conceded that the standard annunciated by Nanty-Glo is inapplicable in federal court. The appropriate standard for a motion for summary judgment is governed by the Federal Rules of Civil Procedure.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if the moving party can "show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c). When ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. See Matsushita Elec. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The Court must accept the non-movant's version of the facts as true, and resolve conflicts in the non-movant's favor. See Big Apple BMW, Inc. v. BMW of N. Amer., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

The moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 265, 106 S. Ct. 2548 (1986). Once the movant has done so, however, the non-moving party cannot rest on its pleadings. See Fed. R. Civ. P. 56(e). Rather, the non-movant must then "make a showing sufficient to establish the existence of every element essential to his case, based on the affidavits or by depositions and admissions on file." Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

occurred at Mercy Fitzgerald Hospital. The plaintiff first alleges that Nurse Welch assaulted and battered him by hitting his hand with a fork. The plaintiff also contends that a security guard assaulted and battered him when the guard subsequently escorted Tarlecki out of the hospital.

Under Pennsylvania law, "an assault occurs when an actor intends to cause an imminent apprehension of a harmful or offensive bodily contact." Sides v. Cleland, 436 Pa. Super. 618, 626, 648 A.2d 793, 796 (Pa. Super. Ct. 1994) (citing Restatement (Second), of Torts, § 21). An assault requires both the actor's intent to place the individual in imminent apprehension of harmful or offensive conduct and the individual's actual imminent apprehension. See Restatement (Second) of Torts, § 21. "A battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." Renk v. City of Pittsburgh, 537 Pa. 68, 76, 641 A.2d 289, 293 (1994). If there is no assault, then there can be no claim for battery. See Belcher v. United States, 511 F.Supp. 476 (E.D. Pa. 1981)

With regard to the alleged assault by Nurse Welch, plaintiff has provided no evidence to suggest that Nurse Welch intended to cause Tarlecki "immediate apprehension" of any harmful or offensive conduct. To the contrary, the evidence produced demonstrates that Nurse Welch was in the process of

feeding the plaintiff's wife, Irene Shore, when Tarlecki entered the room and placed his hand in the path of the fork being used by Nurse Welch to feed Ms. Shore in order to prevent Nurse Welch from feeding her. Nurse Welch testified that she did not intend to cause Tarlecki harm or to contact him. Tarlecki himself noted that Welch was not "going after him" with the fork, but instead was attempting to feed his wife. In light of these circumstances, summary judgment with respect to the assault and battery claim against Nurse Welch is therefore appropriate.

As to the incident involving the plaintiff and the security guard, the court concludes that there is a question of material fact regarding whether the actions of the security guard constituted assault and battery against Tarlecki. Taken in the light most favorable to the plaintiff, the evidence shows that a hospital security guard asked Mr. Tarlecki to leave, following the incident with Nurse Welch in Irene Shore's hospital room, and when he refused to leave, the security guard told him that he had to do so. Tarlecki then told the security guard that he wanted it be "on the record" that he was forced to leave. In response, the security personnel grabbed Tarlecki by the arm and began to walk him out of the hospital. The security guard held onto Mr. Tarlecki's arm for several steps, before letting go and continuing to escort him out of the hospital. Although Tarlecki may have requested that it be "official" that he was required to

leave, he did not necessarily consent to the contact by the security guard. Under these circumstance, the plaintiff has produced sufficient evidence for the jury to determine the intent of the security guard and the extent of the apprehension of the plaintiff. Summary judgment is therefore not appropriate, and the plaintiff's claim for assault and battery against Mercy Fitzgerald Hospital survives summary judgment.[2]

II. Assault and Battery (Count III)

Count III of the complaint asserts an assault and battery charge against Officer Trigg in his individual capacity.[3] The claim arises from an alleged incident at one of Tarlecki's rental properties, in which Officer Trigg investigated a burglary at the property and encountered the plaintiff, who was fixing a window in the basement. The police, including Officer Trigg, ordered Tarlecki to the floor and handcuffed him. Tarlecki alleges that the officers abused and taunted him while he was

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2. Count II names both Nurse Welch and Mercy Fitzgerald Hospital as defendants. Since summary judgment is granted for Nurse Welch with regard to the fork incident and she had no role in escorting Tarlecki out of the hospital, summary judgment is entered in favor of Nurse Welch with respect to Count II.

3. To the extent that Trigg is being sued in his official capacity, the defendant is entitled to immunity from liability for assault and battery pursuant to 42 Pa. C.S.A. § 8541. See Smith v. School District of Philadelphia, 112 F. Supp.2d 417, 424 (E.D. Pa. 2000). Under the Tort Claims Act, the Borough and its officials are immune from all tort claims except in eight enumerated situations. See 42 Pa. C.S.A. §§ 8541, 8542. None of the exceptions are applicable to this claim.

handcuffed on the floor. Taken in the light most favorable to the plaintiff, such conduct would establish a cause of action for assault and battery.

Although governmental employees generally enjoy statutory immunity, a governmental employee loses that immunity if the court determines that the employee's act constituted "a crime, actual fraud, actual malice or willful misconduct." 42 Pa. Cons. Stat. Ann. § 8550. In an action for assault and battery, an officer may be liable "if it is shown not just that he acted intentionally, but also that the officer knew that the force used was not reasonable under the circumstances." Debellis v. Kulp, 166 F. Supp.2d 255, 279 (E.D. Pa. 2001) (citing Renk, 641 A.2d at 293-94). The plaintiff has testified that after he was handcuffed, the defendant and the other officers proceeded to taunt him and drag him on the floor of the basement. From these alleged facts, a reasonable jury could conclude that Trigg acted intentionally and knew that the forced used was not reasonable under the circumstances. Therefore, since the plaintiff raises a question of material fact as to Count III of the complaint and the defendant is not protected by statutory immunity, Count III survives summary judgment.[4]

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4. Defendant Trigg argues that the plaintiff has not identified Trigg as the officer who "dragged" him on the floor. The plaintiff concedes that he cannot identify Trigg as the officer who touched him, but argues that even if Trigg was not the officer who physically abused him, he allowed the abusive

III. False Arrest/Imprisonment (Count IV)

The plaintiff also asserts a claim for false arrest and imprisonment against Chief Smythe, Detective Gentilini, Officer Trigg and Nurse Welch. The claims arise out of two instances. The first is the incident involving Nurse Welch at Mercy Fitzgerald Hospital and the second is the incident during Hurricane Floyd. During Hurricane Floyd, the plaintiff refused to leave his residence, which was severely flooded. When asked to evacuate by the police, including Officer Trigg, Tarlecki and the police officers engaged in hostile conversation. Tarlecki was subsequently arrested and pled guilty to making terroristic threats.

The torts of false arrest and false imprisonment are essentially the same actions. See Olender v. Township of Bensalem, 32 F. Supp. 2d 775, 791 (E.D. Pa. 1999) (citing Gagliardi v. Lynn, 446 Pa. 144, 147, 285 A.2d 109, 110 (1971)).

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treatment to occur. Viewed in the light most favorable to the plaintiff, even if Tarlecki is unable to identify Trigg as the individual who physically dragged him, the plaintiff has raised a question of material fact as to whether defendant Trigg's participation, including deriding the plaintiff as he lay handcuffed on the ground, constituted an intent to cause imminent apprehension of harmful or offensive conduct. See e.g., Smith v. Mensinger, No. 99-1328, 2002 U.S. App. LEXIS 11678, at *21-22 (3d Cir. June 11, 2002) (noting that the plaintiff could not identify who physically hit him, but that "it is undisputed that all of the named officers were in the vicinity at some point when [the plaintiff] was beaten" and that "the extent of the officers' participation is thus a classic factual dispute to be resolved by the fact-finder").

"An action for false arrest requires that the process used for the arrest was void on its face or without jurisdiction; it is not sufficient that the charges were unjustified." Strickland v. Univ. of Scranton, 700 A.2d 979, 984 (Pa. Super. Ct. 1997). Probable cause for an arrest will defeat actions for both false arrest and false imprisonment. See Gilbert v. Feld, 842 F. Supp. 803, 821 (E.D. Pa. 1993). Probable cause "is defined as a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that a party is guilty of the offense." Tomaskevitch v. Speciality Records Corp., 717 A.2d 30, 33 (Pa. Commw. Ct. 1998).

The court finds that there was probable cause to arrest the plaintiff as a result of the incident involving Nurse Welch at Mercy Fitzgerald Hospital. Defendant Welch testified that the plaintiff grabbed her by the wrist and shoved her into a radiator when he entered Shore's hospital room. This testimony is consistent with the statement provided by EMT Sharon Dalrymple, who was in the room at the same time, who indicated that when Nurse Welch was attempting to feed Irene Shore, the plaintiff "brought his left arm up and in between [Welch] and [Shore], pushing the fork and her arm away. [Shore's] bed was by the window and [Welch] was in the corner at the head of the bed; therefore she had no where to go when [Tarlecki] intervened."

According to Ms. Dalrymple, Nurse Welch attempted to protect herself and told Tarlecki not to touch her several times. Although the plaintiff indicates that he did not touch Nurse Welch, he explained that it may have been possible "in the heat of the moment" that he may have grabbed Nurse Welch by the wrist. Nurse Welch's consistent statements, one given the day after the incident and the other two months later, are corroborated by EMT Dalrymple. The statements of both eye witnesses are not inconsistent with the testimony of the plaintiff, who indicated that given "the heat of the moment," he may have grabbed Welch's wrist. Such corroboration and consistency leads to the determination that there was probable cause to arrest Tarlecki in connection with the hospital incident involving Nurse Welch.

Moreover, after his arrest, the plaintiff was held over for trial after a preliminary hearing on September 15, 1999, in connection with this incident. Although a hold-over is not conclusive evidence of the existence of probable cause, an unimpeached hold-over proceeding "will constitute very weighty evidence and the plaintiff will bear a hefty burden in trying to overcome it." Cosmas v. Bloomingdales Bros., Inc., 442 Pa. Super. 476, 484-85, 660 A.2d 83, 87 (1995). The plaintiff has not suggested that the hold-over proceeding was improper in any way.

Furthermore, there was probable cause to arrest the

plaintiff with respect to the incident during Hurricane Floyd. Probable cause for arrest is conclusively established where there is a guilty plea or a conviction. See McGriff v. Vidovich, 699 A.2d 797, 800 (Pa. Commw. Ct. 1997). In connection with the Hurricane Floyd incident, the plaintiff pled guilty to charges of terroristic threats. Because there was probable cause for both the hospital and Hurricane Floyd incidents, the plaintiff has failed to demonstrate that the defendants are liable for false arrest and imprisonment. Summary judgment is therefore granted as to Count IV with respect to all defendants.

IV. Malicious Prosecution (Count VI)

Count VI alleges malicious prosecution against the Borough of Darby, Chief Smythe, Detective Gentilini, Officer Trigg and Nurse Welch. Under Pennsylvania law, in an action for malicious prosecution, the plaintiff must demonstrate "that the defendant (1) instituted the proceedings (2) without probable cause and (3) with actual malice and (4) that the proceeding was terminated in the favor of the plaintiff." Griffiths v. CIGNA Corp., 988 F.2d 457, 463 (3d Cir. 1993) (citing Kelley v. General Teamsters, Local Union 249, 518 Pa. 517, 544 A.2d 940, 941 (Pa. 1988)), rev'd on other grounds, Miller v. CIGNA, 47 F.3d 586 (3d Cir. 1995). The malicious prosecution claim must fail for the same reason that the false arrest and false imprisonment claim fails, in that there was probable cause to arrest Mr. Tarlecki as

a result of the hospital incident and the Hurricane Floyd incident. Summary judgment is granted as to Count VI with respect to all defendants.

V. 42 U.S.C. § 1983 (Count I)

In addition to the two state law claims, Tarlecki also raises two federal civil rights claims. Count I alleges violations of civil rights by the Borough of Darby and Chief Smythe from failing to control and instruct Borough police officers. Section 1983 provides a cause of action to a person who has been deprived of rights secured by the constitution or by federal statutes under color of state law. See 42 U.S.C. § 1983. To prevail in a § 1983 action, a plaintiff must demonstrate: "(1) the defendants acted under color of law; and (2) their actions deprived [the plaintiff] of rights secured by the constitution or federal statutes." Andersen v. Davila, 125 F.3d 148, 159 (3d Cir. 1997). "The first issue in a § 1983 case is whether a plaintiff sufficiently alleges a deprivation of any right secured by the constitution." D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1367 (3d Cir. 1992).

The gravamen of Count I is that the Borough and Chief Smythe directed Darby police officers to harass the plaintiff, resulting in a deprivation of the plaintiff's constitutional rights. Although the court finds that the plaintiff has not been subject to false arrest, false prosecution or malicious

prosecution, taking the facts in the light most favorable to the plaintiff, the plaintiff has raised a genuine question of material fact as to whether he has been subject to abuse of process. "The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it." McGee v. Feege, 517 Pa. 247, 253, 535 A.2d 1020, 1023 (Pa. 1987) (citations omitted)(quoting Publix Drug Co. v. Breyer Ice Cream Co., 347 Pa. 346, 32 A.2d 413 (1943)). "A section 1983 claim for malicious abuse of process lies where prosecution is initiated legitimately and thereafter is used for a purpose other than that intended by the law." Rose v. Reed, 871 F.2d 331, 350 (3d Cir. 1989). A cause of action for abuse of process can be maintained "when process is used to effect an extortionate demand, or to cause the surrender of a legal right, or is used in any other way not so intended by proper use of the process." Bristow v. Clevenger, 80 F. Supp.2d 421, 431 (E.D. Pa. 2000) (citing Brown v. Johnston, 675 F. Supp. 287, 290 (W.D. Pa. 1987)).

In this case, the plaintiff contends that he has been subject to prosecution by the police, as directed by Chief Smythe, not in an effort to enforce the law, but as a way to harass him and to violate his constitutional rights. He contends

that even if there was probable cause to arrest him for the hospital and Hurricane Floyd incidents, his actions constituted such minor criminal behavior that any other individual would not have been charged with those offenses.

He further contends that the severity of the actions of Officer Trigg at Tarlecki's rental property was not commensurate with the threat that Tarlecki posed and thus violated his right to be free from excessive force. He notes that Officer Trigg has known him in prior dealings, including the incident during Hurricane Floyd, yet Officer Trigg still ordered Tarlecki to put his hands up and to lay on the floor, at which time the officers handcuffed him. Thus, the crux of his claim is that the police have used the process for a purpose that is not intended by the law, i.e. for the purpose of harassing him, and have exerted excessive force against him. The court concludes that the plaintiff has thus raised a question of material fact as to whether his constitutional rights have been violated through an abuse of process and excessive force.

Nevertheless, with regard to the Borough of Darby, a municipality cannot be held liable under 42 U.S.C. § 1983 under a respondeat superior theory. See Monell v. Dep't of Social Sev's, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978). Thus, a cause of action may be sustained against a municipality under § 1983 only if the plaintiff's injury resulted from the

implementation of a policy or custom of the municipality. See id. at 694. A policy may be established by demonstrating that a "decision-maker possessing final authority to establish municipal authority with respect to the action" issued a policy or edict. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990). A policy or custom may also be established by demonstrating that a municipality or one of its high officers "approved a subordinate's decision and the basis for it." Id. at 1481. Furthermore, there must be a "affirmative link" between the occurrence of the police misconduct and the municipality's policy or custom. See Rizzo v. Goode, 423 U.S. 262, 371, 96 S. Ct. 598, 604, 46 L. Ed. 2d 561 (1976).

In this case, the policy in question takes the form of an edict or directive on the part of Chief Smythe to harass and retaliate against Tarlecki for a prior victorious lawsuit. The conduct of an official clothed with authority is sufficient to constitute binding authority on the part of the municipality. See Pembaur v. City of Cincinnati, 475 U.S. 469, 480-83, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); Berg v. County of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000). There is no dispute that the Chief of Police is a decision maker and therefore may bind the municipality.

The plaintiff has raised a question of material fact as to whether there was an edict or directive on the part of Chief

Smythe to harass the plaintiff in retaliation for a prior lawsuit. Specifically, when Detective Gentilini, who was the officer who investigated the incident at the hospital and subsequently initiated the criminal proceeding against Tarlecki, called the plaintiff to let him know a warrant had issued for his arrest, Gentilini told Tarlecki that he could not have time to arrange care for his infirm wife because "the Chief wanted this done today." Accepting the facts as true and in the light most favorable to the plaintiff, the arrest of Tarlecki was made at the direction of the Chief Smythe. Given the prior history between Tarlecki and Chief Smythe, including a previous civil rights lawsuit that ended favorably for Tarlecki, a reasonable inference may be raised that Chief Smythe was motivated by a desire to harm Tarlecki or to retaliate against him for his success in the prior lawsuit. Taking the evidence as a whole, including the incidents at the hospital, the rental property, and the plaintiff's house during Hurricane Floyd, as well as the relationship between Tarlecki and the defendants, and viewed in the light most favorable to the plaintiff, the plaintiff raises a question of material fact as to whether the Borough of Darby and Chief Smythe directed Darby police officers to deny the plaintiff of his constitutional rights. Summary judgment on Count I against the Borough of Darby and Chief Smythe is therefore not appropriate.

VI. 42 U.S.C. § 1983 (Count V)

Count V of the complaint alleges a conspiracy to violate the plaintiff's civil rights against the Borough, Chief Smythe, Detective Gentilini, Officer Trigg and Nurse Welch. To prove a conspiracy under § 1983, the plaintiff must demonstrate a an agreement of two or more conspirators to deprive the plaintiff of a constitutional right under color of law. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 700 (3d Cir. 1993). "To allege a civil conspiracy under § 1983, the plaintiff must aver 'a combination of two or more persons to do a criminal act, or to do an unlawful act by unlawful means or for an unlawful purpose.'" Spencer v. Steinman, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997) (citing Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974)). An "agreement is the sine qua non of a conspiracy." Id.

With respect to Nurse Welch, the plaintiff has produced no evidence of any agreement on her part to deprive the plaintiff of a constitutional right. To the contrary, the evidence demonstrates that Nurse Welch went to the police station to report a bona fide incident at the hospital in which she claimed Tarlecki grabbed her wrist and interfered with the performance of her nursing duties. There is no evidence that she conspired with any other individual to file her complaint, nor that after filing the complaint she conspired with any other person to change her

testimony to falsely implicate Mr. Tarlecki. Summary judgment is granted with respect to Nurse Welch on Count V.

Furthermore, the conspiracy claim against the Darby defendants is based upon the conduct of the individual officers acting in their official capacity. The complaint alleges that Chief Smythe, as chief of police, directed the officers to harass the plaintiff through an official edict. In an § 1983 claim, employees of a municipal police department, acting in their official capacities, "are part of the same entity and therefore cannot be charged with civil conspiracy because an entity cannot conspire with itself." Brady v. Cheltenham Township, Civ. A. No. 97-4655, 1998 U.S. Dist. LEXIS 4519, at *13 n.6 (E.D. Pa. April 9, 1998). See also Gregory v. Chechi, 843 F.2d 111, 188 n.4 (3d Cir. 1988); Sunkett v. Misci, 183 F. Supp.2d 691, 722-21 (D.N.J. 2000). Since the Darby defendants may not conspire with each other in their official capacities, and Nurse Welch is not a party to the conspiracy, summary judgment is therefore appropriate in this count against all defendants.

VII. Qualified Immunity

The individual defendants have raised the defense of qualified immunity to the plaintiff's complaint. State officials performing their discretionary functions are shielded from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." Wilson v. Layne, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed 2d 818 (1999). The first question is to determine whether the officer's conduct constituted a violation of a constitutional right. See Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed 2d 272 (2001). In doing so, the court must "arrange the facts in the light most favorable to the plaintiff, and then determine whether, given precedent, those 'facts,' if true, would constitute deprivation of a right." Wilson v. Russo, 212 F.3d 781, 786 (3d Cir. 2000).

The second step in conducting the qualified immunity analysis is to determine whether the constitutional right was clearly established, or, in other words, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, at 202. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The issue becomes, given the established law and the information available to the defendant, whether a reasonable officer in the defendant's position could have believed that his conduct was lawful. See Doe v. Delie, 257 F.3d 309, 318 (3d Cir. 2001).

With regard to Officer Trigg and the alleged assault that occurred in Tarlecki's basement, based on the plaintiff's

version of the facts, after Tarlecki was ordered to the ground and handcuffed, thus posing no threat to the officers, the police officers dragged him on the floor and taunted him, ordering him to stand up when he could not do so because his hands were bound and then laughing at his failed attempts. Accepting this as true, and drawing all reasonable inferences in favor of the plaintiff, this conduct, taken when the plaintiff posed no threat to the officers or others and was not attempting to flee or resist arrest, constitutes a violation of Tarlecki's constitutional right to be free from unreasonable use of force under the Fourth Amendment. See Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989). Furthermore, the right to be free from excessive force is clearly established, in that the use of force violates the Fourth Amendment if it is excessive under objective standards of reasonableness. See Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2001) (citing Graham, 490 U.S. 386). In this instance, a reasonable officer could infer that this force, applied when the plaintiff was handcuffed on the ground, posed no threat and was not attempting to flee, was, in the context of that established right, unlawful. Therefore qualified immunity is not available to defendant Trigg in connection with the alleged assault upon the plaintiff in the basement of the rental property.

To the extent that Chief Smythe asserts qualified

immunity with regard to Count I of the complaint, qualified immunity is not appropriate. Viewing the facts in the light most favorable to the plaintiff and drawing all reasonable inferences in his favor, Chief Smythe directed borough police officers to engage in a pattern of prosecutions and seizures that were brought or effectuated not for the purpose of bringing the plaintiff to justice, but with the intent to harass the plaintiff in retribution for a prior lawsuit. Based on the plaintiff's version of the facts, in which the plaintiff was subjected to criminal prosecutions and deprivation of his liberty, such an abuse of process is a violation of the plaintiff's procedural due process rights. See Jennings v. Shuman, 567 F.2d 1213, 1220 (3d Cir. 1977).

Furthermore, and again based on the plaintiff's version of the facts, it would be clear to Chief Smythe, entrusted with the authority to enforce the law, that the prosecution of an individual not for the purpose of bringing the individual to justice, but for harassment and retaliation and as a result of animosity toward this individual, is unlawful. The Third Circuit noted over twenty years before the alleged incidents in this case that abuse of process – that is, using a criminal or civil proceeding for an improper purpose – violates an individual's constitutional rights. See Jennings, 567 F.2d at 1220. The court has since reiterated the requirements for a cause of action

under § 1983 for abuse of process. See Rose, 871 F.2d at 350. The right is thus clearly established, and given the facts viewed in the light most favorable to the plaintiff and all reasonable inferences drawn therefrom, the prosecution of the plaintiff for the purpose of harassment and retaliation would fall into the contours of that right. Therefore, the Chief Smythe is not entitled to qualified immunity with respect to the alleged conspiracy.

VIII. Conclusion

Summary judgement is therefore denied with respect to Count I in its entirety. Summary judgment is granted on Count II with respect to Nurse Welch and Mercy Fitzgerald Hospital regarding the alleged assault and battery by Nurse Welch to the plaintiff. Summary judgment on Count II is denied, however, with respect to Mercy Fitzgerald Hospital for the alleged assault and battery by the hospital security guard. Summary judgment on Count III is denied in its entirety relating to the alleged assault and battery by Officer Trigg to the plaintiff. Summary judgment is granted on Counts IV, V and VI.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD TARLECKI,	:	CIVIL ACTION
	:	NO. 01-1347
Plaintiff,	:	
	:	
v.	:	
	:	
MERCY FITZGERALD HOSPITAL,	:	
ET. AL.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this **15th** day of **July**, **2002**, pursuant to a memorandum dated July 15, 2002, and upon consideration of defendants Mercy Fitzgerald Hospital and Catherine Welch's (Mercy defendants') motion for summary judgment (doc. no. 32) and defendants Borough of Darby, Robert Smythe, Joseph Trigg and Frank Gentilini's (Darby defendants') motion for summary judgment (doc. no. 39), it is hereby **ORDERED** that the Mercy defendant's motion (doc. no. 32) is **GRANTED IN PART AND DENIED IN PART.**

It is **FURTHER ORDERED** that the Darby defendants' motion (doc. no. 39) is **GRANTED IN PART AND DENIED IN PART**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.